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IN THE

Supreme Court of the United States

October Term 1923

CENTRAL UNION TRUST COMPANY OF
NEW YORK, *Appellant,*

VS.

ANDERSON COUNTY, THE CITY OF PAL-
MISTINE, TEXAS, GEORGE A. WRIGHT,
ET AL., *Appellees.*

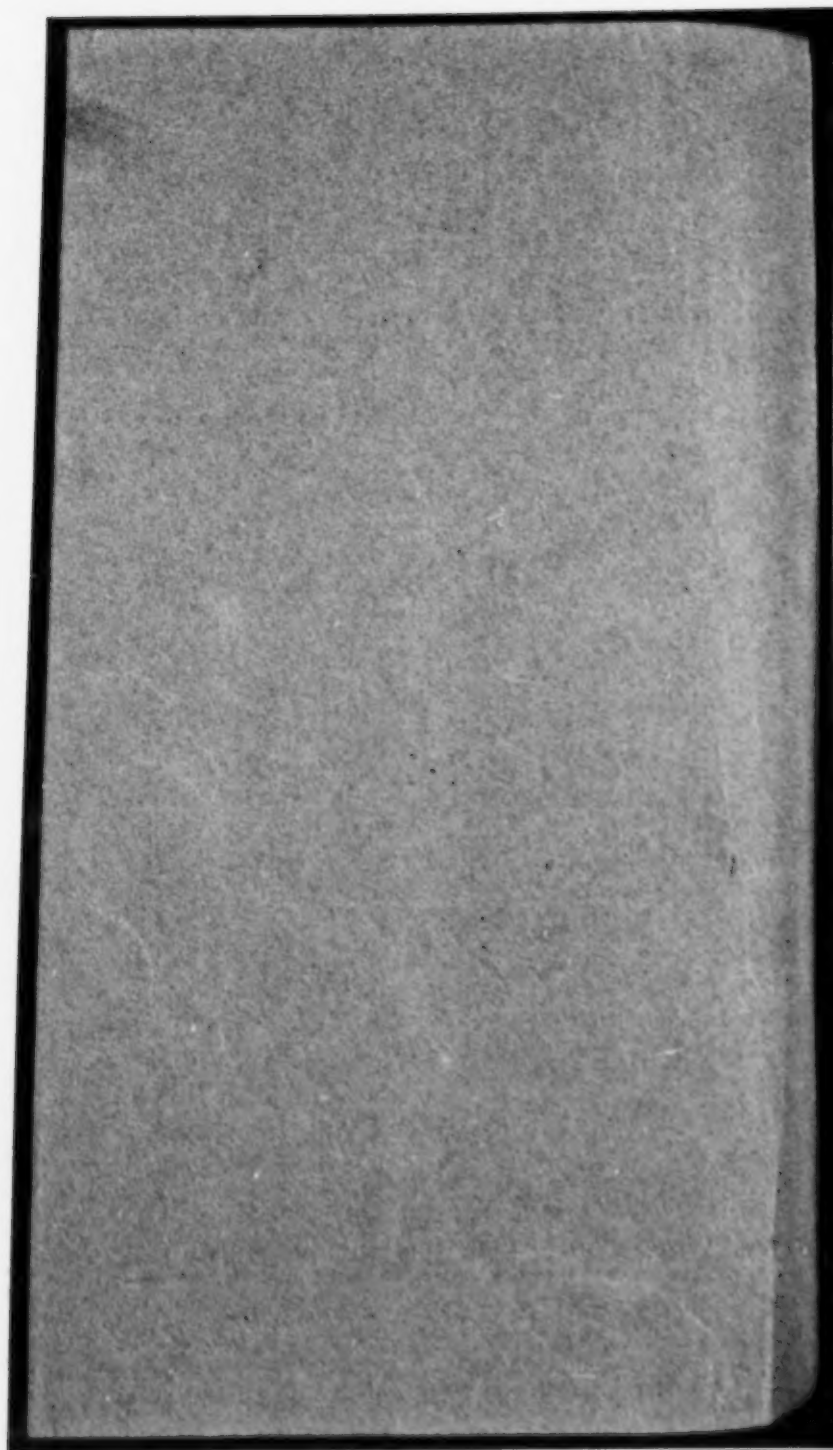
*Appeal from the District Court of the United States for the
Southern District of Texas.*

BRIEF FOR APPELLANT

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IN THE
Supreme Court of the United States

October Term 1923

CENTRAL UNION TRUST COMPANY OF NEW YORK,	<i>Appellant,</i>	} No. 572
vs.		
ANDERSON COUNTY, THE CITY OF PAL- ESTINE, TEXAS, GEORGE A. WRIGHT, ET AL.,	<i>Appellees.</i>	

Appeal from the District Court of the United States for the
Southern District of Texas.

BRIEF FOR APPELLANT

This suit originated in the District Court of the United States for the Southern District of Texas, Houston Division.

The bill of complaint was filed June 5, 1922, as an ancillary or dependent bill in Cause No. 49 in Equity, Central Union Trust Company of New York, Plaintiff, v. International & Great Northern Railway Company et al., Defendants, which original suit was a bill by the Central Union Trust Company of New York, mortgage trus-

tee, to foreclose a mortgage upon the properties of the International & Great Northern Railway Company.

The bill for foreclosure in said cause was filed on August 10, 1914, and receivers were appointed, who went into possession and operation of the properties under orders of the court. On May 17, 1915, the court entered its decree of foreclosure on all the properties of the railway company, foreclosing the mortgage sued upon and decreeing that if the defendant railway company did not pay \$12,908,461.06 with interest at the rate of six per cent. from May 17, 1915, then the properties should be sold by Special Master.

After the filing of the ancillary bill herein involved, the Special Master sold the properties in accordance with the decree to Earle Bailie and Maurice T. Moore for \$5,000,000.00, certain obligations therein mentioned and other obligations as might be determined by the court thereafter. The Special Master made report to the court and thereafter the purchasers having assigned their bid and right to purchase, the court, on August 10, 1922, confirmed the sale and directed the Master, the Receiver and the defendant, railway company, and the foreclosing complainant, Central Trust Company of New York, under its changed name of Central Union Trust Company of New York, to execute a deed to a corporation to be termed International-Great Northern Railroad Company, upon the terms and conditions as set out in said decree.

The Central Union Trust Company of New York, successor of the original complainant, Central Trust Company of New York, the foreclosed properties being still in the possession of the court under full reservations, as hereinafter more fully shown, on June 5, 1922,

filed as a part of the original foreclosure suit its ancillary or dependent bill in aid of the foreclosure against Anderson County, the City of Palestine, Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes and the International & Great Northern Railway Company, alleging that all the defendants in the ancillary bill, except the International & Great Northern Railway Company, were asserting that in 1872 and 1875 contracts were made with the remote predecessors in interest of the International & Great Northern Railway Company, the defendant in the original suit herein, for the location of the general offices and shops and roundhouses of such remote predecessors in interest at Palestine, in Anderson County, and that by virtue of the terms of an act of the Legislature of the State of Texas of 1889, amended in 1899, and now Articles 6423, 6424 and 6425, Revised Statutes of said State, these contracts operated, by virtue of the terms of said act, to forever require the original contracting companies and all successors in title to the railway properties to forever maintain the principal offices, roundhouses and shops of whatever railway company should own the properties at Palestine, in the County of Anderson, in said State of Texas.

The ancillary bill further alleged that the defendants, other than the International & Great Northern Railway Company, in 1912 sued said International & Great Northern Railway Company in the State court in Anderson County upon said alleged contracts and under said statutes, and, the cause having been transferred to the District Court of Cherokee County, obtained a decree against the International & Great Northern Rail-

way Company on January 17, 1914, to the effect that it should forever keep and maintain the general offices, machine shops and roundhouses for the operation of the railway in Palestine, and that it be perpetually enjoined and restrained from maintaining the general offices of its executives at any other place; that this decree became final in 1918, and these defendants, plaintiffs in said cause, allege and insist that said decree is binding upon any purchaser of the property, and declare that they will enforce it by suit in other forums under the threat of penalties prescribed by the statute, if not observed by any purchaser under the decree of foreclosure which the court had already entered in the original suit of complainant in said equity cause No. 49, and that the defendants claim that that decree is *res adjudicata* against Central Union Trust Company, of New York, plaintiff, and any purchaser under the decree of foreclosure which had been entered in said cause No. 49, or which might be hereafter entered, although plaintiff's foreclosure mortgage antedated said suit in the State District Court, and although plaintiff was never made a party to that suit, the defendants having full notice of the mortgage.

This plaintiff, the foreclosing mortgagee in the original suit, alleged in this its ancillary bill, that as a matter of fact said contracts of 1872 and 1875 were never made and never became binding, if made, upon the successors of the corporations with whom they were alleged originally to have been made, and never became binding upon the properties and were not binding upon complainant, and did not bind the purchaser under the foreclosure sale in said original cause No. 49.

Complainant further alleged that, inasmuch as its

said mortgage which was foreclosed had been sued upon in cause No. 49 and was executed long prior to the institution of said suit in the State court to enforce the alleged obligations of said contracts, and at the time of the institution of said suit said properties were in the possession of the court through its receivers, and this plaintiff was never made a party to that suit, that the principles neither of *res adjudicata* nor former judgment had any operation against this plaintiff, and that it had full right to contest the actual existence of said contracts and their binding force upon the properties or against the purchaser under its foreclosure sale.

It was further alleged by complainant in its ancillary bill that the court in its original decree of foreclosure in the original cause fully reserved all questions not disposed of in the decree for future adjudication and fully reserved the right to dispose of all claims and charges against the foreclosed properties, and that in its order of August 10, 1922, confirming the sale, the court reserved all questions relating to amounts of compensation, charges, allowances, costs, disbursements and expenses referred to in the final decree and to suits "now pending in the court" affecting the property for further hearing and determination and that under these reservations no other court than the District Court of the United States for the Southern District of Texas had power or jurisdiction to hear or determine the issues tendered in said ancillary bill.

The defendants Anderson County, the City of Palestine and the individual residents of said county, filed a plea to the jurisdiction of the court. The plea to the jurisdiction was sustained and the bill dismissed. The court thereupon certified that the only question upon

the pleading, process and record was a question of jurisdiction; that the court held there was no jurisdiction of any of the defendants and that the only question decided by the court was that it did not have jurisdiction; that the question of jurisdiction was the only issue upon which the case was decided and upon which the final decree was based.

Whereupon appeal was allowed and prosecuted to this court under Section 238 of the Judicial Code.

W. H. Hoffman, D. A. Kelley, Robert H. Rogers et al., v. Peter McClelland, Junior, et al., decided by this court April 21, 1924. (Sup. Ct. Rep., Vol. 44, No. 14, 407.)

The following specifications of error were filed:

"V. The court erred in sustaining the motion to dismiss, and in decreeing the dismissal of this cause; because this suit was ancillary in aid of the decree of foreclosure in the case of Central Union Trust Company of New York v. International & Great Northern Railway Company et al., which decree was entered on May 17, 1915, and because this suit was filed in this court before the sale of the properties of the International & Great Northern Railway Company under the decree of foreclosure, and while the properties were in the possession of the court; whereby this court had jurisdiction, and having jurisdiction, the jurisdiction remained, whereby this court was the proper forum for this suit.

"VI. The court erred in sustaining the motion to dismiss, and in dismissing this cause; because this court in the suit of the Central Union Trust Company of New York v. International & Great Northern Railway Company et al., No. 49 in Equity, in this court, to which this suit was ancillary, had the power to reserve as it did, in the

decree of foreclosure of the properties of the International & Great Northern Railway Company entered May 17, 1915; and in the decree of confirmation of sale entered August 10th, 1922, after the institution of this suit, as it did, the exclusive jurisdiction of this suit; and because, by amendment to the pleading herein, after the confirmation of sale, such reservations in the decree of confirmation were set out and plead and drawn to the attention of this court, wherein jurisdiction of this suit was directly reserved, and because this suit was brought before the court had sold the property or released it; whereby even if a public duty was involved, this court had complete jurisdiction of said cause.

"VII. The court erred in holding that it did not have jurisdiction, and in dismissing this suit on the motion of all of the defendants, except the railway company; because by the decree of foreclosure in No. 49 in Equity in this court, entered May 17th, 1915, this court had expressly reserved jurisdiction of this case, and of any such case as this.

"VIII. The court erred in dismissing this case on the motion of all of the defendants, except the railway company; because in Section 9 of the decree of confirmation of sale made after this suit was instituted and entertained by this court, and set up and drawn to the attention of this court, in the amendment to the pleading expressly reserved jurisdiction of 'suits now pending in this court in this cause, or affecting the property above dealt with,' and stated that the same were 'respectively reserved by this court for further hearing and determination;' and because this court declared in such reservation that 'all questions not hereby disposed of are reserved for future adjudication including all claims pending, or hereafter made against the property sold originating under the Receiver, the defendant or its predecessor in title.'

"IX. The court erred in dismissing this case

upon the motion - All of the defendants, except the International & Great Northern Railway Company, because this suit had been instituted before the sale of the property and while it was in the possession of this court, and had been entertained by this court; and because, in the ninth section of the decree of confirmation of sale of the properties, pleaded by an amendment to the pleading after the decree of confirmation was entered, this court expressly reserved jurisdiction of 'suits now pending in this court in this cause.' The words 'this cause' referring to No. 49 in Equity, being the foreclosure case, to which this suit is ancillary, styled Central Union Trust Company of New York v. International & Great Northern Railway Company et al.; whereby this court contracted with the plaintiff and with the purchasers under the decree of foreclosure then confirmed, to maintain the jurisdiction of this particular case, and whereon the sale was made and consummated on the face of such decree and contract of the court, all as appears in the record and proceedings in this case.

"X. The court erred in sustaining the motion to dismiss this case filed by all the defendants herein, except said railway company; because this suit was instituted and entertained by the court while all the properties remained in the possession of the court and because this court had not 'finished the case' and had not 'given up possession and control before this suit was brought;' and because there was not an 'absence of action on the part of the court of the United States' before the sold-out property was turned over to the purchaser, which was done long after the institution of this suit, but on the contrary this 'the court of the United States' had acted and entertained this suit and reserved jurisdiction thereon before the turnover of the property; whereby, although even if a public duty be involved, the jurisdiction had attached and remained." (Tr. 68-70.)

FIRST POINT.

The court erred in sustaining the motion to dismiss and dismissing the cause for lack of jurisdiction, because this suit was ancillary and in aid of a decree of foreclosure in the cause of Central Trust Company of New York v. International & Great Northern Railway Company et al., which decree was entered on May 17, 1915, and because this suit was filed in the court of original foreclosure before the sale of the properties of the International & Great Northern Railway Company under the decree of foreclosure and while the properties were in the possession of the court, whereby the court below had jurisdiction, and having jurisdiction, such jurisdiction remained, and said court was the proper forum for the suit.

Statement.

The Central Trust Company of New York, a mortgage trustee, on August 10, 1914, filed its bill against the International & Great Northern Railway Company in the District Court of the United States for the Southern District of Texas at Houston in Equity Cause No. 49, in said court, Jas. A. Baker and Cecil A. Lyon being appointed Receivers of the property and assets of said railway company and through such Receivers they were taken into the possession of the court. (Tr. 52.)

On May 17, 1915, the court entered its decree of foreclosure of all the properties of said railway company foreclosing the mortgage sued on of 1911 and decreeing that if the said railway company would not pay \$12,908,461.06 with interest at the rate of six per cent. per annum from May 17, 1915, then all the prop-

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erties should be sold on request of solicitors of the complainant and providing for the sale of the same by special master appointed by the court.

After the filing of the pending suit on June 5, 1922, the amount decreed being unpaid, the Special Master was duly called on to make the sale and in pursuance of the decree sold all of said properties, including the trackage of 1106 miles of main track and all assets, moneys, and claims whatsoever in the hands of or belonging to the Receiver or in the control of the court. The Special Master made due report to the court of the sale made by him to Earle Bailie and Maurice T. Moore for \$5,000,000.00, subject to liens of the existing first mortgage and other and various prior obligations fixed by the court and made prior in right if not prior in time, as well as obligations which the court might thereafter fix. Thereafter said Bailie and Moore assigned their bid and right to purchase the properties and the whole matter was presented to the court and said court did, on August 10, 1922, confirm the sale and direct the Master, the Receiver and the defendant railway company and the foreclosing complainant, Central Trust Company of New York, which at that time had changed its name to its present name of Central Union Trust Company of New York, to execute a deed to a corporation to be termed International-Great Northern Railroad Company, upon the terms and conditions in said decree set out. (Tr. 52-53.)

In the decree of foreclosure of May 17, 1915, it was by the court decreed as follows:

It was ordered, in the event that the International and Great Northern Railway did not pay \$12,908,461.06 decree, with interest thereon at the rate

of six per cent. (6%) per annum from May 17, 1915, then that all of the properties of the railway should be sold under the decree, as therein directed, the sale to be made on the request of the solicitors of the complainant.

Section 15 of the decree was as follows: "All questions not hereby disposed of are reserved for future adjudication." The section followed all other portions of this decree, herein referred to. And it was also provided therein, as follows, commencing in folio 50:

"The court reserved the right to resell the mortgaged property upon such notice as it may direct, at the risk and cost of the purchaser in case the purchaser thereof shall fail or omit to make any payments on account of the purchase price within twenty days after the entry of the order requiring such payment."

It was decreed that the purchaser, in addition to the sum bid, should take the property and receive the deed or deeds therefor, subject to the satisfaction and discharge of any unpaid compensation which shall be allowed by the court to the receivers, and any indebtedness, obligations or liabilities which shall have been contracted or incurred by the Receivers before they shall have delivered possession of the property sold, whether or not represented by certificates, and also any indebtedness or liability contracted or incurred by the defendant railway company in the operation of the mortgaged property prior to the appointment of the Receivers, which is prior in lien or superior in equity to the First Refunding (Foreclosed) Mortgage, and which shall not be paid or satisfied out of the income of the mortgaged property in the hands of the Receivers, upon the court adjudging the case to be prior in lien or superior in equity to the First Refunding Mortgage and directing the payment thereof.

It was further decreed that in the event that

the purchaser, after demand made, shall refuse to pay any before-mentioned indebtedness or liability, the person holding the claim therefor, upon twenty days' notice to the purchaser, his successors or assigns, may file his petition in this court to have such claim enforced against the mortgaged property in accordance with the usual practice of this court in relation to claims of a similar character, and such purchaser, his successors or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and any party shall have the right to appeal from any judgment, decree or order made thereon.

It was also decreed that for the purpose of enforcing the foregoing provisions of this decree, "jurisdiction of this cause is retained by this court, and the court reserves the right to retake and resell the mortgaged property in case the purchaser, his successors and assigns, shall fail to comply with any order of the court for the payment of such prior indebtedness or liability within twenty days after the service of a copy of such order, or, if any appeal be taken from any such order within twenty days after service of written notice of the final affirmance of such order upon appeal."

"The Receivers shall, not more than twenty nor less than ten days prior to the date fixed for the sale of the mortgaged property under this decree, file with the clerk of this court:

(a) A statement showing as definitely as practicable all indebtedness, obligations and liabilities contracted or incurred by them then remaining unpaid.

(b) A statement showing as definitely as practicable all indebtedness or liabilities contracted or incurred by the defendant railway company in the operation of the mortgaged property prior to the appointment of the Receivers and which, so far as they are informed, are claimed to be prior in lien

or superior in equity to the First Refunding Mortgage which was foreclosed.

(c) A statement showing as definitely as practicable all outstanding contracts and leases (including all traffic, trackage, terminal crossing, operating and other executory contracts), to which the defendant railway company or the Receivers may be parties, and stating, in the case of contracts and leases to which the defendant railway company is a party, whether such contracts or leases have been assumed or adopted by the Receivers.

Each of such statements shall be advisory only, and nothing therein contained shall be binding upon the purchaser or purchasers at said sale, nor shall such statements constitute ground for the release from any debt because of any representations therein or omission therefrom.

Any such claim for indebtedness or liabilities which shall not have been included in such statement of the Receivers or which shall not have been presented in writing to the Receivers or filed with the clerk of this court prior to the time of delivery of possession of the mortgaged property, shall be presented for allowance and filed within six months after the first publication by the Receivers of a notice to the holders of such claims to present the same for allowance. The Receivers shall publish such notice upon request of the solicitors for the complainant, once a week for four successive weeks in a newspaper of general circulation published in each of the following places, to wit: Laredo, San Antonio, Austin, Palestine, Longview, Fort Worth, Houston and Galveston, in the State of Texas, or in such of said or other papers as the court may by order hereinafter direct; and the Receivers shall also, on or before the date of the last publication of said notice, mail a copy of such notice to each of such holders of said claims as may be known to the Receivers at the last postoffice address known to the Receivers.

Any such claim which shall not be so presented or filed within the period of six months after the publication of such notice shall not be enforceable against the Receivers nor against the mortgaged property nor against any purchaser, his successors or assigns. The purchaser of the mortgaged property, and his successors and assigns, shall have the right to enter his or their appearance in this cause, and he or they or any of the parties to this suit shall have the right to contest any claim, demand or allowance existing at the time of sale and then undetermined and any claim or demand which thereafter may arise or be presented which would be payable by such purchaser, his successors or assigns, or which would be chargeable against the mortgaged property in addition to the amount bid at the sale, and he or they may appeal from any decision relating to any such claim, demand or allowance."

It was shown that the statement had been duly filed and the notices and advertisements duly made, as provided above should be done. (Tr. 53-55.)

The order of the court of date August 10, 1922, confirming the sale of the properties, is as follows:

"In Equity No. 49

Central Union Trust Company of New York,
Trustee, Complainant,
against

International and Great Northern Railway Company, et al., Defendants.

Order Confirming Sale.

This cause came on further to be heard on the petition of Earle Bailie and Maurice T. Moore filed July 31, 1922, and on the Special Master's Report of Sale filed July 28, 1922, and on all other proceedings in the above-entitled cause, and was argued by counsel, and thereupon, upon considera-

tion thereof, the court being fully advised, finds, adjudges and decrees as follows:

I. The Special Master appointed in the Final Decree entered May 17, 1915, has fully complied with all the directions in said Final Decree contained as to the sale of the property in and by said Final Decree directed to be sold.

II. The sale of said property held July 28, 1922, was held in all respects as provided by said Final Decree, and at said sale the Special Master sold at public auction to Earle Bailie and Maurice T. Moore the property in and by said Final Decree directed to be sold, to wit:

All railroads, lines or railroads, extensions, branches and bridges, all locomotives, cars, rolling stock and equipment, all premises, leases, leasehold interests, contracts, rights, privileges, franchises and all other property, real, personal and mixed, of every description whatsoever which International and Great Northern Railway Company (hereinafter called the railway company) owned or was entitled to at the time of the execution and delivery of its First Refunding Mortgage, dated August 1, 1911, to Central Trust Company of New York, as Trustee, or which was thereafter acquired by said railway company.

All lands, contracts, equipment, rolling stock and all property of every description whatsoever at any time acquired by the Receivers of the said railway company appointed by the United States District Court for the Southern District of Texas by order made and entered on or about August 10, 1914, or by the sole Receiver thereafter appointed, including all balances of cash, credits and income remaining in the hands of the Receivers, or Receiver, after application thereof in accordance with the provisions of said Final Decree.

All and singular the tenements, hereditaments

and appurtenances belonging or in any wise appertaining to the property hereinbefore designated, or any part or parcel thereof, and the reversion and reversions, remainder and remainders, tolls, income, rents, issues and profits thereof, and also all of the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said railway company and of said Receivers, or Receiver, of, in and to the same and any and every part thereof;

as an entirety for the sum of \$5,000,000.00, said sum being the highest bid for said property.

III. Said Earle Bailie and Maurice T. Moore have, by their petition filed in this cause, stated that they propose to assign all their right, title and interest in and to the property described in the form of deed hereto annexed and marked Schedule B, sold to them as aforesaid, including their right to receive a deed or deeds or other instruments of transfer and conveyance thereof as provided in said Final Decree, to a corporation organized, or to be organized under the laws of Texas, having power to acquire said property, which they propose shall be named International-Great Northern Railroad Company. Said corporation is hereafter for convenience referred to by said name of International-Great Northern Railroad Company, but if it shall have a different name the provisions of this order respecting International-Great Northern Railroad Company shall apply to said corporation under such different name.

It is therefore ordered, adjudged and decreed as follows:

First: The Special Master's Report of Sale filed herein July 28, 1922, is in all things confirmed and the sale therein reported, namely: the sale to Earle Bailie and Maurice T. Moore of all property in and by the Final Decree in this cause directed to be sold, as an entirety, for the

sum of \$5,000,000.00, is made final and absolute, subject, however, to all the terms and conditions of said Final Decree and of this order.

Second: The Special Master is directed, upon the delivery to him of the notes and bonds (or certificate of the complainant representing the same) as in Article Fifth below set out, and upon there being filed in this cause by Earle Bailie and Maurice T. Moore the assignments (in form hereto attached, and marked Schedule A, which is hereby approved), to International-Great Northern Railroad Company of all their right, title and interest in and to the property covered by said sale made by the Special Master, to execute and deliver to International-Great Northern Railroad Company a deed of the property described in the form of deed hereto annexed and marked Schedule B, substantially in said form, which is approved by this court, and the railway company, the Receiver herein, and Central Union Trust Company of New York as trustee under the First Refunding Mortgage, are directed to join with the Special Master in the execution and delivery of a deed to International-Great Northern Railroad Company substantially in the form of said deed Schedule B, or, if said International-Great Northern Railroad Company shall so request, to execute and deliver to said company separate deeds or releases of all their right, title and interest of, in and to the property so conveyed, assigned and transferred to said International-Great Northern Railroad Company by the Special Master.

Third: Upon the production of said deed or deeds, International-Great Northern Railroad Company shall be let into the possession of the property thereby conveyed or transferred, and shall after such delivery of possession, hold, possess and enjoy the property so conveyed and transferred, and every part and parcel thereof, free from any trust or lien imposed thereon by the First Refunding Mortgage and free from all claims, rights, in-

terest or equity of redemption, in or to the same by or of the Railway Company, its successors and assigns, and by or of all persons claiming by, under or through the railway company, subject, however, to all the terms and conditions of said Final Decree and of this order.

Fourth: Upon the delivery to International-Great Northern Railroad Company of the deed to be executed and delivered to it by the Special Master pursuant to the provisions of Article Second hereof, the Receiver shall assign, transfer and deliver to said International-Great Northern Railroad Company all cash, current assets and materials and supplies then in the possession of the Receiver.

Fifth: There shall be credited upon the purchase price of the property sold at said sale, for the Three Year Gold Notes and appurtenant coupons held subject to the order of the Special Master pursuant to the certificate of Central Union Trust Company of New York, deposited by said Earle Bailie and Maurice T. Moore with the Special Master, as stated in his Report of Sale as a pledge that they would make good their bid for said property, such sum as would be paid in cash upon such Gold Notes and coupons out of the proceeds of sale if the whole amount of the purchase price had been paid in cash. In advance of the delivery of said deed or deeds, and within sixty days from the date of the entry of this order, or within such additional period as this court may hereafter by its order or decree permit, said Earle Bailie and Maurice T. Moore or International-Great Northern Railroad Company shall secure the payment of the remainder of the purchase price of the property sold at said sale by turning over to the Special Master to be delivered by him to the clerk of this court, to be cancelled or credited as may be provided by the further order of this court and as provided in said Final Decree, bonds, notes and coupons to at least the following

amounts in addition to the Three Year Gold Notes specified in said certificate of Central Union Trust Company of New York, heretofore deposited with the Special Master:

First Refunding Mortgage Bonds of International and Great Northern Railway Company, \$457,000.00 principal amount:

Three Year Gold Notes of International and Great Northern Railway Company, \$3,543,000.00 principal amount.

Said bonds, notes and coupons shall be in bearer form or accompanied by proper transfers to the Special Master. In lieu of turning over to the Special Master said bonds and notes, the Special Master shall accept the certificate of the complainant, that it holds subject to his order bonds and notes of the amount and character herein specified. No payment in cash shall be required at this time on account of the purchase price of any of said property nor until this court shall so require, but this court reserves jurisdiction from time to time to require such further payment or payments in cash on account of said purchase price as this court may direct, and this court reserves a paramount lien and charge upon the property to be conveyed, for the payment into this court in cash of the unpaid part of the purchase price.

Sixth: Upon the execution and delivery by the Special Master to International-Great Northern Railroad Company of a deed substantially in the form and of said deed Schedule B hereto and the execution and delivery by International-Great Northern Railroad Company to the Special Master of a counterpart thereof, all obligations and liabilities of Earle Bailie and Maurice T. Moore on account of the purchase of any of the property sold as aforesaid or by reason of their bid at said sale under said Final Decree or the acceptance of said bid, shall forthwith cease and determine and said Earle Bailie and Maurice T.

Moore shall individually be discharged from all such obligations and liabilities.

Seventh: The Three Year Gold Notes and coupons held subject to the order of the Special Master pursuant to the certificate of Central Union Trust Company of New York, deposited by said Earle Bailie and Maurice T. Moore with the Special Master as stated in his said Report of Sale, and the bonds, notes and coupons represented by any certificates of the complainant which may be received by the Special Master pursuant to the provisions of Article Fifth of this order, shall remain with the complainant by whom such bonds, notes and coupons are held, to abide the further order of this court; and when the amounts payable out of the proceeds of sale upon the First Refunding Mortgage Bonds and Three Year Gold Notes and coupons secured respectively by the First Refunding Mortgage foreclosed and by the Trust Agreement enforced in and by the Final Decree in this cause, shall have been determined as in said Final Decree provided, and by the further order of this court, the Special Master shall give notice of the time and place where said bonds, notes and coupons may be presented for payment as in said Final Decree provided, and all such bonds, notes and coupons presented for payment shall be stamped under the court's direction with a notation of the credit or payment thereon of the amount so payable and such bonds, notes and coupons shall thereafter be returned to the respective owners and holders thereof.

Eighth: The court reserves the jurisdiction over the property sold with reference to all claims against the sold-out International & Great Northern Railway Company, which have been litigated or may hereafter be litigated in this or any court, so far as to enforce the payment of any judgments therefor out of the property sold, if the same be not paid within ninety days after the delivery of the deed (herein provided for), to the purchasers

or their assignee, if such judgments are within the protection of the Revised Statutes of Texas, Article 6624 and 6625, or either of such articles, and the payment thereof is hereby made a charge upon the property.

Ninth: All questions relating to amounts of compensation, charges, allowances, costs, disbursements and expenses, referred to in said Final Decree, and to suits now pending in this court in this cause, or affecting the property above dealt with, are hereby respectively reserved by this court for further hearing and determination, and all adjustments and payments to be made, unless agreed upon by the parties in interest, shall hereafter be determined, fixed, allowed and settled by this court, and all questions not hereby disposed of are reserved for future adjudication, including all claims pending or hereafter made against the property sold originating under the Receiver, the defendant or its predecessors in title. Any party to this cause and any party who has intervened in this cause, may at any time apply to this court for further relief at the foot of this order." (Tr. 55-60.)

The assignment referred to in Section Second of the decree of confirmation as above set out as made by Messrs. Bailie and Moore conformed to the recital thereof in the deed approved by the court to be executed substantially as in the form set out in Section III, second sub-section of the decree, and exhibited to the court as in the decree stated were in the form as therein referred to, and covered the property as set out in Section II of the decree of confirmation of sale. (Tr. 60.)

The whole railroad and all of the assets and properties of the sold-out International & Great Northern Railway Company and of the Receiver thereof, or held

by him, were on November 30, 1922, delivered to and turned over to the International-Great Northern Railroad Company, which then began operation of the same as a public carrier. (Tr. 60.)

In 1912, Anderson County, the City of Palestine, George A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes filed a suit against the International & Great Northern Railway Company in the District Court of Anderson County, which suit alleged that in 1872 and 1875 contracts were made with the Houston & Great Northern Railroad, subsequently consolidated with the Houston & Great Northern Railroad and with the International & Great Northern Railroad Company, for the location of the general offices, shops and roundhouses of said railway companies at Palestine, in Anderson County, Texas, and that in 1889 the legislature passed an act, amended in 1899, being now Articles 6423-5 of the Revised Statutes of Texas, under which statute where contracts had been made by railroad companies for the location of general offices, shops or roundhouses, in consideration of aid to such railroads, such railroad companies were compelled under the compulsion of severe penalties to perpetually maintain the offices, shops and roundhouses at the points agreed upon and that these contracts as affected by said statute became and were an obligation inherent in the right to operate the railway properties as a public carrier and vested in the property and ran with it as a burden forever, and bound all remote vendees and successors. Decree was asked that the International & Great Northern Railway Company be compelled forever to keep and maintain the general

offices, machine shops and roundhouses for the operation of the railway in Palestine and that it be perpetually enjoined and restrained from keeping or maintaining the offices, shops and roundhouses at any other place whatsoever. (Tr. 3.)

The properties of the International & Great Northern Railway Company were then in the possession of the Federal District Court for the Southern District of Texas through its receivers appointed August 10, 1914, in said Equity Cause No. 49, Central Union Trust Company of New York, Trustee, v. International & Great Northern Railway Company, and the Central Trust Company of New York, the predecessor of the complainant in this cause, was never made a party to that suit. This suit in the State court was transferred to the District Court of Cherokee County, Texas, which rendered judgment as prayed for. The judgment of the District Court of Cherokee County was affirmed by the Court of Civil Appeals, 174 S. W. 305, and writ of error was denied by the Supreme Court. Writ of error was sued out from the judgment of the Court of Civil Appeals to this court on alleged Federal grounds, and this court affirmed the judgment of the Court of Civil Appeals, 246 U. S. 424. The reasoning of the Supreme Court of Texas is found in 106 Texas, 60. It was held that the contracts declared upon as affected by the statute of 1889 constituted a perpetual burden upon the property and franchises of the company and impressed their use with an obligation to maintain the locations provided by the contracts in the hands of all successive owners of the property.

During the continuance of the receivership no effort

was made to enforce this judgment and the properties of the railway being still in the possession of the court, the Central Trust Company of New York under its then name of Central Union Trust Company of New York, plaintiff in the foreclosure suit, the mortgage foreclosed being of date 1911, on June 5, 1922, and prior to the sale under foreclosure, filed its ancillary bill in the original cause, making the plaintiffs in the General Offices suit in the State court defendants in aid of the foreclosure proceedings, alleging that it was never a party to the proceedings against its mortgagor and was not bound by that judgment; that as a matter of fact, no such contracts as set up in the proceedings in the State court to which it was not a party, to wit, the contracts of 1872 and 1875, ever existed; that, therefore, the State statute of 1889 never came into operation; that if such contracts ever existed, they were wholly unauthorized and *ultra vires*; that they had been promptly repudiated and were barred by limitation; that their obligations had been foreclosed by successive foreclosures under mortgages antedating both the contracts and the act of 1889; that by reason of successive mortgage foreclosures specifically set out and purchases at foreclosure sales neither the International & Great Northern Railway Company nor its immediate predecessors in title were bound thereby; that to so hold would impair the obligation of valid contracts and that the statute of 1889, if held to have the effect claimed, was invalid as impairing the obligation of contracts and imposing an added obligation long subsequent to the time of making the contract, and that said statute, if held to impose the duty either upon the contracting parties or their continuous suc-

cessors, forever imposed an unreasonable burden upon interstate commerce, contrary to the Constitution and laws of the United States. It was alleged that to compel the purchaser at the foreclosure sale herein to forever keep and maintain its general offices, shops and roundhouses (Tr. 1-30; Tr. 42-49), whereby the value of the property as a going concern was injured to the extent of many millions of dollars and the annual expense of operation needlessly increased many hundreds of thousands of dollars. It was further alleged that the defendants were threatening by suit in the State court to enforce the judgment of the District Court of Cherokee County, Texas, against the purchaser at such foreclosure sale, and to the end that such injury to the property then in the possession of the court should be obviated and the property passed to the purchaser under foreclosure sale free from the liens, charges and obligations laid upon it by the judgment of the District Court of Cherokee County, injunction was sought against the defendants restraining them from instituting any such suits or undertaking to assert rights under said judgment against the properties in the hands of the purchaser.

On July 28, 1922, the defendants herein filed plea to the jurisdiction, alleging that it appeared upon the face of the bill that the jurisdiction of the court as a Federal Court to hear and determine the suit is invoked only because the action is between citizens of different States; that plaintiff is an inhabitant and resident of the City of New York and State of New York, and the defendants were not inhabitants or residents of the Southern District of Texas, but were and are each and all inhabitants and residents of Anderson County, in

the Eastern District; and that it appeared upon the face of the bill that the general offices of the International & Great Northern Railway Company, the co-defendant of these defendants and the only other defendant in the suit, were at the commencement of the suit and are now located and established at the City of Palestine, in the Eastern District, and said city was at the time of the commencement of the suit and is now the domicile of said railway company; and that it appeared upon the face of the bill that by final judgment of the courts of the land, in full force at the time of the commencement of this suit, and now, and in all things operative and binding, then and now, upon said International & Great Northern Railway Company, said Palestine, Texas, had been established as the place of its domicile and is now the place of its domicile. Wherefore, as is disclosed on the face of the bill of complaint, this suit is not properly cognizable by this honorable court, and this court is without jurisdiction of it; and these defendants accordingly pray that it be dismissed." (Tr. 51.)

On August 29th, the trial court granted a motion to dismiss and entered decree accordingly. (Tr. 65-66.)

On the same day, the court made and filed its certificate upon the question of jurisdiction, wherein the court certifies:

"On the pleadings of the plaintiff as well as the motion to dismiss, it appeared that the plaintiff was a citizen of and domiciled in New York State, and the defendants citizens of and domiciled in the Eastern District of Texas, except that the International and Great Northern Railway Company was alleged by the plaintiff to be domiciled by its charter in Houston, in Harris County, Texas, by the

other defendants to be domiciled in Palestine, Anderson County, Texas, in the Eastern District, but the court being of the opinion that said defendants have filed the motion to dismiss in proper form, and that no question of lien or servitude upon the property was presented, but rather a question of a liability on the part of a new concern to perform the public duties imposed by law upon the old corporation, and that this should be a controversy between the said defendants and the new company, buying the property at the sale, which cannot be heard in this court, except by the consent of said defendants, and that to hold otherwise would unduly extend the doctrine to ancillary jurisdiction, the court was of the opinion that there was no jurisdiction; and made the decree of dismissal.

"Now, therefore, it is certified that the question of jurisdiction of this court upon the grounds hereinbefore stated was properly presented by a motion to dismiss, namely, that there was no jurisdiction of this case.

"It is now certified that the only question upon the pleadings and process and record, for the decision of the Supreme Court of the United States, involved in the proceedings had, was a question of jurisdiction and that the International and Great Northern Railway Company filed its appearance, as a defendant, but did not further appear, but that the court held that there was no jurisdiction of it, or of any other of the defendants herein.

"The only question decided by the court was that it did not have jurisdiction.

"Now, therefore, it is certified that the question of jurisdiction of this court, upon the ground stated, was the only issue upon which this case decided, and on which the final decree was based.

"I found as stated above therefore that it was the duty of the court to dismiss the bill, which was accordingly done. I further certify that it is the only question, being one of law, upon the plead-

ings and process and record for the decision of the Supreme Court of the United States, as appears above, to wit, the jurisdictional question, and that this certificate is granted at the term and on the day on which the judgment in the cause was entered. In open court, Houston, August 29, A. D. 1923." (Tr. 71-72.)

Appeal was, therefore, prosecuted within the time allowed by law direct to this court.

The statute of 1889 as amended by the Act of 1899 will be found set out at length as Exhibit A to this brief.

Authorities.

- Julian v. Central Trust Co., 193 U. S. 93.
- Krippendorf v. Hyde, et al., 110 U. S. 276.
- Dewey v. West Fairmont Gas Coal Company et al., 123 U. S. 329.
- Compton v. Jesup et al., 68 Fed. 263.
- St. L. S. F. R'y Co. v. McElvain, 253 Fed. 123.
- Ferguson v. O. & S. W. R'y Co., 227 Fed. 513.
- Hume v. City of New York, 255 Fed. 488.
- Cushman et al. v. Warren-Schaff Asphalt Paving Co., 220 Fed. 857.
- Gas & Electric Co. v. Manhattan Traction Corporation, 266 Fed. 634.
- Mutual Reserve Fund Life Association v. Phelps, 190 U. S. 147.
- Peck v. Elliott, 79 Fed. 10.
- Brun et al. v. Mann, 151 Fed. 145.

Argument.

The properties of the International & Great Northern Railway Company which were being foreclosed in the original suit, No. 49 in Equity, were at the time of the filing of this ancillary bill in the possession of the court through its Receiver. The decree of foreclosure

had been rendered and entered, but the sale had not been made and the properties were in course of administration. The plaintiff in the original suit, the trustee of the mortgage of 1911, filed this suit as an ancillary bill in aid of the foreclosure, so that the properties might be sold free of the alleged claims of the defendants. These claims constitute under the decision of the Supreme Court in *I. & G. N. R'y Co. v. Anderson County et al.*, 106 Texas, 60, a continuing charge upon the property. They affect the right of the purchaser to operate the road. They are, not only a limitation upon the continuance of corporate power, but a limitation pertaining to the use and enjoyment of the railroad property. They qualify the use and enjoyment of the property by an abridgement of the rights of the owner as to location of its roundhouses, machine shops and principal offices. The claims asserted involve an annual and useless expenditure and charge upon the revenue of the properties in excess of \$500,00.00 and decreases the value of the property in the hands of the purchaser to the extent of \$3,000,000.00. As stated by the Supreme Court of Texas, they constitute

“a limitation that pertains to the use and enjoyment of essential parts of the railroad property,”

and, therefore directly interfere with possession, ownership and control of the property then being administered by the court under its decrees and which were about to be sold under plaintiff's mortgage of 1911. The bill alleges that the defendants are claiming that under a decree of the District Court of Cherokee County rendered in 1914, in their favor against the Inter-

national & Great Northern Railway Company, the mortgagor, the general offices, shops and roundhouses of said company were forever tied to and would be perpetually located at the town of Palestine, in Anderson County, and that they would seek to assert the obligation of this judgment against the properties in the hands of the purchaser at the foreclosure sale then pending. No more serious lien, charge and injury to these properties then being administered by the court and about to be sold under its decree can be imagined. The mortgagee, Central Union Trust Company of New York, whose mortgage of 1911 long antedates the filing of this suit and the date of this decree against the mortgagor, in order that the property might be sold free of this claim, invokes the ancillary jurisdiction of the court administering the properties and asks that the defendants be enjoined from seeking to enforce such claims, setting up that its mortgage antedated the suit; that it was not a party thereto; that as a matter of fact the alleged contracts of 1872 and 1875, which must exist to give incidence to the statute of 1889, never had any existence, and various other allegations going to the validity of defendants' claims not necessary for consideration here.

It must, of course, be admitted that the complainant, Central Union Trust Company of New York, is not bound by this judgment against its mortgagor, for while a judgment against a mortgagor rendered prior to the execution of the mortgage binds the mortgagee as a privy and is conclusive upon him, a mortgagee is not bound by any proceeding against his mortgagor which was not begun until after the execution of the mortgage, unless he was made a party thereto. If,

therefore, at the time this suit was filed, the court, through its receivers, had possession of the property, that court was the proper court through ancillary proceedings in which to litigate existing claims affecting the possession, operation and maintenance of the properties upon which decree of foreclosure had been entered and of which sale was about to be made. Questions of the binding force of this judgment of the State court, either as *res adjudicata* or as a question of former judgment, go to the merits of the case and not to the jurisdiction of the court.

The fallacy which pervades the argument of appellees in the lower court and which found lodgment in the decree of dismissal was that the holding of the State court in the suit against the mortgagor, railway company, establishing against it the terms of the General Office Statute of 1889, constituted merely the enforcement of a general police regulation of the State as established by its statutes, and that of such a suit the court had no jurisdiction; ignores the outstanding fact that complainant's mortgage lien was in process of foreclosure; that the properties were in the possession of the court; that complainant's mortgage long antedated the proceedings in the State court; that these proceedings, eventuating in a final judgment, constituted a direct interference with the possession, operation and value of the properties; that complainant had the right to test these questions and was not bound by the judgment, and that it had the right to prove that the contracts of 1872 and 1875, the existence of which alone gave incidence to the statute of 1889, never existed.

For the purposes of the argument, it might be admitted that all questions as to the validity of the stat-

ute of 1889 might be precluded under the doctrine of *res adjudicata*, but nevertheless, the court in which the ancillary bill was filed was, not only the proper court, but the only court which had jurisdiction to determine these questions which complainant, appellant here, had the right to raise.

Where jurisdiction has once been rightfully obtained by a Federal Court, it may be retained until complete relief is afforded within the general scope of the equities to be enforced. This jurisdiction having been obtained, the court also has jurisdiction of suits which are a continuation of, incidental or ancillary to the original suit. The usual nature of these ancillary bills are (1) proceedings looking to the enforcement, the setting aside, or the modification of the judgment or decree rendered, (2) restraining proceedings in other courts pending the original suit, and (3) receiverships and similar proceedings where the court, the ancillary jurisdiction of which is invoked, is administering a property or a fund.

Judge Sanborn in *St. Louis, San Francisco Railway Company v. McElvain*, 253 Fed., 123, in discussing the ancillary jurisdiction, says:

“A suit in equity dependent upon an original suit or action of which the Federal Court had jurisdiction, may be maintained in that court (1) to aid, enjoin or regulate the original suit, (2) to restrain, avoid, explain or enforce the judgment or decree therein, (3) to enforce or adjudicate liens or claims to property in the custody of the court in the original suit, and (4) to enforce its decree or judgment in the original suit to prevent the re-litigation in other courts of the issues it has heard and adjudicated in the original suit, and to protect

the titles and rights acquired by purchasers under its decree or judgment from attacks by suit or otherwise, based on the theory that its adjudications in the original suit were illegal and ineffectual, and to accomplish these ends the court has the jurisdiction and authority to use its writs of injunction and its writs of assistance."

In that case the railway company had been sold under foreclosure and was in the possession of the purchaser, the decree reserving jurisdiction being not as explicit as those of the decrees in this cause. McElvain brought suit in State Courts upon claims against the foreclosure company which had answered in suit, and the purchaser by ancillary bill sought to enjoin the prosecution of these suits. It was argued that the suit could not be maintained because a dependent suit may be maintained only between those who are parties to the original suit, and the court answered this contention by saying that:

"A dependent suit may be maintained by the parties to the original suit, or by one who claims under the adjudication and decrees therein against one who assails that adjudication or decree in a subsequent suit in a court without appellate jurisdiction on the ground that it is illegal and ineffectual although the latter was not a party to the original suit, the adjudication or the decree."

After discussing the case of *Julian v. Central Trust Co.*, 193 U. S., 93, and other authorities, the opinion proceeds:

"But in a case in which a Federal Court first obtains jurisdiction of the subject-matter in controversy, as this court did, by the commencement and prosecution to decree and sale of the original suit, and where it acts in aid of its own jurisdiction, to enforce or protect its orders or decrees, or the title

or disposition under them of the property within that jurisdiction, it may, notwithstanding the section cited (Section 720, U. S. Revised Statutes) enjoin or restrain all proceedings in the State Court commenced after it obtained jurisdiction which would have the effect of defeating or impairing its jurisdiction or the lawful effect of its orders, decrees, adjudications or title which it has made or is making in the exercise of that jurisdiction."

Julian v. Central Trust Company, 193 U. S. 93, is a leading case upon the ancillary jurisdiction, and without further citation of authority, is sufficient to maintain this bill. In this case the Central Trust Company of New York foreclosed a second mortgage on the property of the Western North Carolina Railroad. The sale was had under decree and property purchased by the Southern Railway Company which went into possession. About three years after the purchaser took possession, suit was brought against the Western North Carolina Railroad Company for damages for the death of an employee in the State Courts, which held that, notwithstanding the foreclosure and sale under the statutes of North Carolina, the company and its corporate property was liable. Execution was issued on the judgment and the Trustee and purchaser filed an ancillary bill in the original foreclosure proceedings to enjoin the sale. The reservations in the decree were not so specific as those here involved, but the court held that the proceedings were ancillary and sustained the jurisdiction. It says, page 111, etc.:

"It is obvious that by this decree of sale and confirmation it was the intention and purpose of the Federal Court to retain jurisdiction over the cause so far as was necessary to determine all liens and

demands to be paid by the purchaser. It accepted the purchaser, and thereby made it a party to the suit. The court reserved the right to retake the property if necessary to enforce any lien that might be adjudged against the same. On the other hand, the purchaser agreed to pay only such demands as the Circuit Court might declare and adjudge to be legally due, with the right of appeal from such judgment. These provisions make apparent the purpose of the court to retain jurisdiction for the purpose of itself settling and determining all liens and demands which the purchaser should pay as a condition of security in the title which the court had decreed to be conveyed. If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because in the view of the State Court it was ineffectual to pass title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view of protecting the prior jurisdiction of the Federal Court and to render effectual its decree.

* * *

“Nor is it an answer to say that these judgments were for causes of action arising subsequent to the confirmation of sale. The Federal Court by its decree reserved the right to determine what liens or claims should be charged upon the title conveyed by the court, and by the levy and sale to pay these judgments the title is charged with other liens established in another court in a proceeding to which the purchaser was not a party. The Federal Court in protecting the purchaser under such circumstances was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun.

In *Farmers' Loan & Trust Company*, 129 U. S. 206, Mr. Justice Miller said: ‘But the doctrine that after a decree which disposes of a principal subject of litigation and settles the right of the parties in regard to that matter, there may subsequently

arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights may be appealed from, is well established by the decisions of this court.'

+ "We think this case belongs to the class instanced
 by the learned justice, and that the Circuit Court
 to settle all claims against the property and to de-
 termine what burdens should be borne by the pur-
 chaser as a condition of holding the title con-
 veyed. In such cases the jurisdiction of the court
 may be invoked by supplemental bill or bill in the
 nature of a supplemental bill irrespective of the cit-
 izenship of the parties. *Freeman v. Howe et al.*, 27
 How. 450. The authorities are collected in a note
 to Sec. 97, Vol. 1, of *Bates on Federal Equity Pro-*
cedure, and the doctrine thus summarized: 'It
 would seem that the prevention of the conflict of
 authority between the State and Federal Courts,
 and the protection and preservation of the juris-
 diction of each, free from encroachments by the
 other, are considerations which lie at the very foun-
 dation of ancillary jurisdiction. A bill filed to con-
 tinue a former litigation in the same court, or which
 relates to some matter already partly litigated in
 the same court, or which is an addition to a former
 litigation in the same court, by the same parties
 or their representatives standing in the same inter-
 est, or to obtain and secure the fruits, benefits and
 advantages of the proceedings and judgment in a
 former suit in the same court by the same or ad-
 ditional parties, standing in the same interest, or
 to prevent a party from using the proceedings and
 judgment of the same court for fraudulent pur-
 poses, or to restrain a party from using a judg-

ment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit.'

"While recognizing the weight which should be given to decisions of the Supreme Court of a State in construing its own laws, and being disposed to follow them and accept the conclusions reached in construing local statutes in every case of doubt, we are here dealing with a right and title conferred by authority of the decree of a Federal Court, which may be virtually set aside and held for naught if the property awarded can be taken upon execution in suits to which the purchaser is not a party. It is conceded that the Federal right could be set up in the State Court from which the execution issued, and, if denied, the ultimate rights of the parties can be determined upon writ of error to this court. In the view we have taken of this case the Federal Court had not lost its jurisdiction to protect the purchaser at its sale upon direct proceedings such as are now before us."

It is clear that the rights asserted by the defendants in this case, as construed by the Supreme Court of the State, directly interfere with the operation and control, and impose a lien, charge and burden upon the foreclosed property. Suppose that the law relied upon gave these defendants the right of judgment for damages and execution for breach of contract, and it was sought to levy upon the foreclosed property under execution: then the analogy would be complete between such a case

and that here presented. However, the burden sought to be relieved against is far more serious in its nature in that it is a continuous and perpetual wrong.

As a test of the proposition: Suppose these defendants at the very time that complainant filed the bill now before the court had filed an ancillary bill seeking to subject the properties in the hands of the purchaser to the burdens and charges which they set up. Could the purchaser or the Trustee have been heard to say that this court had no jurisdiction by reason of citizenship or residence? It must be conceded, of course, that they had such a right. The right then is correlative.

Ferguson v. O. & S. W. Railway Company, 227 Fed. 513, is very much in point. In this case Childs conveyed land as a right-of-way to a railroad, reserving certain rights as to crossings and imposing upon the railway company the obligation to maintain a road. Thereafter, Childs mortgaged the land to Ferguson, who went into possession. Suit to foreclose this mortgage was brought by successors to Ferguson's title. Pending this suit, Childs made a quit-claim deed to the railway, relieving it from the obligation of the original deed. The mortgage was foreclosed, the property sold and the sale confirmed. The purchaser under the foreclosure sale brought suit against the railway company by way of ancillary bill in the foreclosure suit to compel compliance with the reservations in the original deed to the railway company. The bill was dismissed for lack of jurisdiction, but this action was reversed, the court holding that while the plaintiff in the foreclosure suit could have brought in the railway at the inception

of the proceedings, the purchaser had the right to bring it in by ancillary bill and compel performance with the covenants of the original conveyance.

Krippendorf v. Hyde et al., 110 U. S. 276. This is a leading case upon the subject of ancillary bills. Suit was filed at law in the Federal Court and attachment was levied on the property of Krippendorf, who tendered replevy or delivery bond and obtained relief. He undertook to intervene in the case, but intervention was not allowed in accordance with some State rule of practice at law. Various creditors with debts under jurisdictional amounts made themselves parties to the proceedings to obtain benefits of the attachment. Judgment was rendered for the debts and for foreclosure of attachment. Thereupon Krippendorf deposited in court the value of the property and filed a bill in the same court making all the creditors in the original suit and the marshal parties, asking that the marshal be restrained from paying the fund to the creditors and that the same be adjudicated to belong to him. No allegations as to citizenship, either of defendants or plaintiffs, were made, and the bill was dismissed for lack of jurisdiction. On appeal, it was held that the bill was not original, but merely ancillary or dependent and the order of dismissal was reversed. The court, in holding that the bill was ancillary or dependent, says that in such a proceeding the question is not whether the bill is independent and original or supplemental and ancillary in the sense of the rules of equity pleading, but whether it is original and independent or supplemental and ancillary with reference to the line which divides the jurisdiction of the Federal from the State Courts. Thus, under the chancery practice, a bill to

enjoin a judgment at law is certainly an original bill, yet the Supreme Court has many times decided that when such a bill is filed in the same court as that rendering the original judgment, it is not to be considered as an original bill, but a mere continuance of the original proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpoena on the defendant, though he be a citizen of another State, if he were a party to the original judgment.

Dewey v. West Fairmont Gas Coal Company et al., 123 U. S. 329. West Fairmont Gas Company, a New York corporation, sued Dewey et al., partners, in a State Court in West Virginia for breach of contract to receive coal. The defendants removed to the Federal Court and there filed a bill against the plaintiff, a New York corporation, and its vendee, a West Virginia corporation, alleging that the coal, a part of which had been delivered, was not according to sample; that they had been damaged in a large sum; that the conveyance of property to the West Virginia corporation was in fraud of their rights as creditors, asking cancellation of the conveyance and the subjection of the properties to whatever judgment they might obtain. It was objected to this bill that the court had no jurisdiction of the West Virginia corporation, it being a citizen of the same State with plaintiffs. It was held that the bill was ancillary to the original suit at law, and was maintainable without reference to citizenship or residence of the parties.

Hume v. City of New York, 255 Fed. 488. Property administered under a receivership had been sold under

foreclosure and was in hands of the purchaser. The Receiver brought suit in the original cause against the City of New York for damage to the property sold. The court said:

“If the present bill can be said to restrain, avoid, explain or enforce the judgment or decree in the original suit, or to enforce or obtain judgment upon claims of injury to the property in the custody of the court in the original suit, such a dependent suit is but a continuation in the court of equity of the original suit, to the end that complete justice may be done, and, notwithstanding lack of diversity of citizenship, the bill was maintained as an ancillary bill.”

Cushman et al. v. Warren-Schaff Asphalt Paving Company, 220 Fed. 857. In this case judgment was had against a city under a paving contract directing levy of tax to pay. Plaintiff filed bill against several abutting owners against whose property the amount would be a lien for their pro rata part of the contract price. No one of these debts was sufficient in amount to confer jurisdiction, but the bill was held to be purely ancillary, and, therefore, maintainable as dependent upon the original suit.

Gas & Electric Co. v. Manhattan Traction Corporation, 266 Fed. 634. A Receiver of a street railway in foreclosure proceedings pending in the Federal Court brought suit for injunction against a municipality to enjoin passing of a resolution forfeiting its franchise. Here was certainly a proceeding directly involving the highest police powers. It was held, nevertheless, that the suit was purely ancillary to the original cause, and properly brought.

Mutual Reserve Fund Life Association v. Phelps, 130 U. S. 147. Judgment was had in a Kentucky State Court against a life insurance society, and upon execution and return of *nulla bona*, it being shown that the company had withdrawn all its agents from the State, the Kentucky Court, without notice, appointed a Receiver to collect premiums due the company for the purpose of applying them in payment of the judgments. Suit was brought in the Federal Court to enjoin the activities of this Receiver on the theory that the appointment was void as being without notice. It was held that the proceeding was purely ancillary and within the power of the court.

Compton v. Jesup et al., 68 Fed. 263. A suit was brought in a Federal Court to foreclose one of several mortgages to which the Wabash & Pacific Railway Company and its component parts were subject. The road was sold under decree of foreclosure, but had not been turned over to the purchasers by the Receivers who had been in possession. While the road was still in possession of the Receivers, the mortgagees under a prior mortgage commenced a suit in the same Federal Court to foreclose their mortgage, to which suit numerous persons having interest in or claims upon the road were made parties and filed answers and cross-bills, citizens of the same States appearing upon both sides of the controversy. It was held that the Federal Court which had possession of the property had inherent ancillary jurisdiction to entertain the suit, because of such possession, without regard to the citizenship of the parties, and that in such dependent or ancillary suit the court had power to bring in by compul-

sory process any person claiming an interest in the property whose presence was necessary to the relief sought by complainant, although such person did not himself seek the establishment of his interest in the suit and his citizenship was such that it would defeat the jurisdiction if it depended upon diverse citizenship. The decision is by the Circuit Court of Appeals for the Sixth Circuit, and is rendered by Judge Taft, the present Chief Justice. It contains a comprehensive discussion of the theory of ancillary bills, and, among other things, says:

"Now, it frequently happens that under the process of the Federal Courts, exercising the original and lawful jurisdiction conferred expressly by the Federal Constitution and statutes, possession is taken and control exercised over property in which persons not indispensable parties to the suit have an interest, by lien, mortgage, and in other ways. In such cases there often is no diversity of citizenship between such persons and the plaintiff or defendant to the suit which would warrant the Federal court in hearing an independent suit between them. But it may be essential, to preserve intact their rights in the property, that such third persons should be permitted, at once, to have specific relief, which can only be granted by a court having possession and control of the property. And yet, in accordance with the principles already stated, no court but the Federal Court can exercise possession and control over the property in its custody. Of necessity, therefore, the Federal courts exercise an ancillary jurisdiction in such cases; and third persons are permitted to come into the Federal Court, and set up their interest in the property, and secure the same full and adequate protection and relief to which they would be entitled in any court of

competent jurisdiction, were the property not impounded in the Federal Court."

The court further says:

"It must be conceded that the Circuit Court had no jurisdiction to hear and determine the controversies presented by the Knox and Jesup bill, on the ground of diverse citizenship of the parties, for it did not exist. The jurisdiction was assumed on a very different ground. When the bill was filed in the court below, the property which it was thereby sought to sell on foreclosure was in the possession of receivers appointed by that court in a previous litigation instituted to foreclose mortgages junior to the Knox and Jesup mortgage, and to sell the road to pay all junior liens and floating indebtedness. It is true, the litigation had proceeded to foreclosure sale and final decree; but for some reason, not plainly disclosed, the court refused to deliver possession to the purchasers, and retained it in the custody of the court for the purpose of protecting the interests of all the parties to the original litigation. Knox and Jesup wished to foreclose their mortgage, to marshal all liens, to sell the road at the highest price, to preserve the road and its income from waste by the appointment of a receiver. It is manifest that no other court than that in which the receivers then in possession had been appointed could grant such relief. Whether other courts could decree foreclosure and marshal liens, or not, certainly no other court could take possession of and sell the road, and deliver an unclouded title to a purchaser. If Knox and Jesup could not file their bill in the court below, then the act of that court in maintaining possession of the mortgaged property through its receivers would result in great injustice to them, and would constitute an abuse of its process. To prevent this, the court below had inherent ancillary jurisdiction, pending its possession of the rail-

road, to hear and determine all petitions for relief presented to it in respect of the possession and control of the road. It is of no importance that the custody of the railroad was likely soon to be changed from the court to the intending purchaser under the previous foreclosure proceedings, at which time any tribunal of competent jurisdiction could give all the relief prayed by Knox and Jesup. Their mortgage was then due. They were not obliged to await the uncertain delays of other litigation before taking steps to assert their rights. They therefore properly appealed to the court below, as the only tribunal which could do so, to give them adequate relief at once; and this was properly accorded to them, without regard to the citizenship of the parties to their bill. The foregoing reasoning is fully supported by many decisions of the Supreme Court. Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked."

The further objection was made in this case that, although the court had jurisdiction to maintain the ancillary bill of these mortgagees, it had no power to bring the defendant Compton before it, but the court held that, inasmuch as Compton was asserting a claim and a lien upon the property, it was proper to make him a party defendant and dispose of the claim.

Peck v. Elliott, 79 Fed. 10, decided by Circuit Court of Appeals, Sixth Circuit. An insolvent corporation had been placed in the hands of receivers and its as-

sets administered by the Federal court, and the receivers filed petition, alleging the inadequacy of assets to pay debts, and setting out that Elliott, a director and president of the corporation, was indebted to the corporation in a large sum for unpaid stock subscription, and asking that this stock liability be enforced. The usual objection of lack of jurisdiction was made and the bill dismissed. The case was heard on appeal by Judges Taft and Lurton, both subsequently members of the Supreme Court, and by Judge Sage, District Judge. Judge Lurton, rendering the opinion of the court, said:

"The jurisdiction of the court to entertain this petition of the receivers against the appellee depends upon its jurisdiction in the original case, to which this proceeding was wholly ancillary. This petition is auxiliary to the original suit. It is a petition by the receivers asking the aid of the court to enable them to collect in an asset of the corporation. It was filed by direction of the court under an order made in the principal cause. The jurisdiction of the court in the principal cause is not questioned, and cannot be in this collateral suit.

* * * Such a proceeding would not involve any question of citizenship, or amount in controversy, or mode of trial. The complete jurisdiction of the court over the *res*, the property and assets of this corporation, involved its right to bring before it persons having possession of any of those assets, or having claim thereon, or who were indebted to it, and either itself hear and determine all controversies, or refer them to a master or to a jury, as it saw fit. A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved."

Brun, et al., v. Mann, 151 Fed. 145. This case would

seem to involve rather an extended application of the doctrine of ancillary suits. A judgment had been obtained in a Federal court for damages. The defendant had died and the estate was administered in the probate court of Colorado. The judgment was proved up in the probate court as a claim against the estate. The widow and administratrix would make no application to sell the property to pay the claim. The widow filed a bill in the Federal court to procure a decree of discharge and satisfaction of the original judgment, and on cross-bill the judgment was revived to be paid in due course of administration with order that copy of the decree should be certified to the probate court for allowance, classification and payment. It was allowed as a claim against the estate, but the administratrix would take no action to apply the lands of the estate to the payment of the claim. She having refused to do so, the plaintiff filed a bill in the court of the original judgment to subject the land to the payment thereof, the widow having in the meantime resigned as administratrix. While objecting to the jurisdiction of the court, she made application to file cross-bill which set forth her claim for a widow's allowance and claim for allowance for expenses and services as administratrix. This was denied. Decree was rendered subjecting the land to the payment of the debt, and appeal was taken. The court of appeals, Judges Sanborn, Van Devanter and Phillips, held that the court below had jurisdiction, the proceedings being ancillary. It said:

“Diversity of citizenship and the amount in controversy conferred jurisdiction upon the United States Circuit Court to render the original judg-

ment against Tillett for his wrongful seizure and conversion of the cattle. Plenary power to enforce this judgment and to determine every controversy between the parties thereto and their successors in interest which conditioned that enforcement inhered in, and was a necessary part of, this jurisdiction. No State legislation may take away from the national courts the power to enforce their adjudications, because that power is derived from the supreme law of the land, from the Constitution and the statutes of the United States. 'The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. * * * The only limit upon this power of the national courts to execute their judgments and decrees is that they may not seize or take from another court property in its exclusive legal custody.

"Nor was the right of the complainant to invoke this jurisdiction conditioned by the existence of a Federal question or of diversity of citizenship or of the amount in controversy. A bill in equity dependent upon a former action of which the Federal court had jurisdiction may be maintained in the absence of either of these attributes to aid, enjoin, or regulate the original suit; to restrain, avoid, explain, or enforce the judgment or decree therein; or to enforce or obtain an adjudication of liens upon, or claims to property in the custody of the court in the original suit. Such a dependent suit is but a continuation in a court of equity of the original suit, to the end that more complete justice may be done. * * * This is a suit to enforce the execution of the judgment of revivor rendered in the Federal court. It is not, as counsel claim, a proceeding to enforce the allowance or the judgment of allowance of the complainant's claim in the county court. That allowance was complete in itself and *functus officio* when made. It adjudged

no recovery by the complainant, no sale for his benefit, no further relief. The judgment of survivor in the Federal court granted to the complainant the right to recover \$19,718.56 of the estate of Tillett, and this suit was instituted to enforce that right and to determine the controversy over the exemption of the lands which conditions it. It has every element of a dependent suit in equity in the Federal courts."

It will be observed that the contention was made that this assumption of jurisdiction by ancillary bill was in effect an invasion of the jurisdiction of the State probate court, but the court held otherwise.

It is submitted that had there been no reservations of control in the decrees and orders of the court, that the properties of the railway, being in its possession and under its administration, the bill was purely ancillary to the main purposes of the original suit, and that, therefore, the court had jurisdiction to maintain it, regardless of other jurisdictional requisites.

SECOND POINT.

The court erred in sustaining the motion to dismiss, and in dismissing this cause; because this court, in the suit of the Central Union Trust Company of New York v. International & Great Northern Railway Company, et al., No. 49 in Equity, in this court, to which this suit was ancillary, had the power to reserve, as it did, in the decree of foreclosure of the properties of the International & Great Northern Railway Company entered May 17, 1915, and in the decree of confirmation of sale entered August 10th, 1922, after the institution of this suit, as it did, the exclusive jurisdiction of this suit; and because, by amendment to the pleading here-

in, after the confirmation of sale, such reservations in the decree of confirmation were set out and plead and drawn to the attention of this court, wherein jurisdiction of this suit was directly reserved, and because this suit was brought before the court had sold the property or released it.

Statement.

That portion of the decree of foreclosure in the original cause, No. 49, of May 17, 1915, applicable, is set out on pages 51-55, and among other pertinent provisions contains the following:

“All questions not hereby disposed of are reserved for future adjudication. * * * The court reserves the right to resell the mortgaged property upon such notice as it may direct, at the risk and cost of the purchaser in case the purchaser thereof shall fail or omit to make any payments on account of the purchase price within twenty days after the entry of the order requiring such payment.”

After this suit was filed and during its pendency, the properties were sold and the order confirming the sale of date August 10, 1922 (Tr. 55-60) was entered. Among other pertinent reservations of jurisdiction and control over the properties found in this decree are the following:

“Eighth. The court reserves jurisdiction over the property sold with reference to all claims against the sold-out International & Great Northern Railway Company, which have been litigated or may hereafter be litigated in this or any court, so far as to enforce the payment of any judgments therefor out of the property sold, if the same be

not paid within ninety days after the delivery of the deed (herein provided for), to the purchasers or their assignee, if such judgments are within the protection of the Revised Statutes of Texas, Articles 6624 and 6625, or either of such articles, and the payment thereof is hereby made a charge upon the property.

"Ninth. All questions relating to amounts of compensation, charges, allowances, costs, disbursements and expenses, referred to in said final decree, and to *suits now pending in this court in this cause, or affecting the property above dealt with*, are hereby respectively reserved by this court for further hearing and determination, and all adjustments and payments to be made, unless agreed upon by the parties in interest, shall hereafter be determined, fixed, allowed and settled by this court. And *all questions not hereby disposed of are reserved for future adjudication, including all claims pending or hereafter made against the property sold originating under the Receiver, the defendant or its predecessors in title*. Any party to this cause and any party who has intervened in this cause, may at any time apply to this court for further relief at the foot of this order." (Tr. 59-60.)

At the time the order of confirmation was entered, this ancillary bill, appeal from the dismissal of which is prosecuted in this cause, was pending in the original foreclosure suit.

Authorities.

- In re Farmers Loan & Trust Co.*, 129 U. S. 206.
Wabash R. R. Co. v. Adelbert College, 208 U. S. 38.
Central Trust Co. v. Railway Co., 59 Fed. 385.
Smith v. Missouri Pac. R'y Co., 266 Fed. 653.
Gunter v. Atl. Coast Line, 200 U. S. 273.

Argument.

These authorities, as well as the authorities cited under the preceding proposition, it is thought, amply sustain the contention of appellant that even had there been no special reservation of control in the decrees of the court administering the properties, the mere possession of the *res* made it necessary and proper to go into that court to relieve the property of asserted charges upon and against it which directly affected its value in the most substantial way, directly interfered with its control and operation and imposed upon it a needless and absolutely unnecessary annual charge in expense of operation amounting to many hundreds of thousands of dollars. If by reason of a judgment against a mortgagor obtained in a suit filed long subsequent to the date of the mortgage and which it cannot be seriously contended is binding upon such prior mortgagee the operation of the property is so far controlled as to render it less valuable, the mortgagee's security is impaired, and as a consequence the purchaser at the sale does not succeed to the rights which the mortgagee acquired at the date of the mortgage. The court being in possession of the property had the inherent right upon ancillary application to determine these questions, but the reservations of the two decrees should relieve the matter of all possible doubt. The mortgagor and the purchaser had the right under these decrees to assume that such adverse claims should be determined by the court administering the properties. This suit was pending and the court reserved jurisdiction of "all questions relating to suits now pending in this court or affecting the properties dealt with." It is difficult to conceive a more specific res-

ervation of jurisdiction, and the point here made comes accurately within the statement of the principle by Mr. Justice Holmes in *I. & G. N. v. Anderson County*, 246 U. S. 431. In the case then before this court, the jurisdiction of the State court was challenged upon the ground that the court of the last foreclosure on the properties (Federal Circuit Court) was the only proper forum, and it was said:

"But a decree of foreclosure does not render the purchaser and property foreclosed sacrosanct. The Circuit Court *had finished the case and had given up possession and control before this suit was brought.* *Shields v. Coleman*, 157 U. S. 168; *Wabash R'y Co. v. Adelbert College*, 208 U. S. 38. Even if it were true that the foreclosure sale and order carried an immunity from the present demand that the railroad company was entitled to set up, *in the absence of action on the part of the court of the United States*, it would not take away the power of the State court to decide as to the existence of an alleged public duty on the part of a railroad within the territory where the court sat."

The difference between that case and the pending case is, first, the court had not given up possession of the property, but the property was in its possession and being actively administered at the time this proceeding was filed; and second, specific and accurate reservations to determine questions such as those here involved were made in the decree. Attention is again directed to the proposition that the force and effect of the judgment of the District Court of Cherokee County against the mortgagor company, whether as considered from the standpoint of *res adjudicata* or of

former judgment, goes to the merits of the case and not to the jurisdiction of the court. The learned trial judge recognizes this and does not dismiss upon the merits, but, as clearly shown by his opinion, holds that the court as a Federal Court had no jurisdiction to determine whether or not the supposed contracts of 1872 and 1875 ever existed and had no jurisdiction as a Federal Court to determine whether the Act of 1889, described as a general police regulation of the State, was applicable to the properties being foreclosed. Even though the principle asserted were sound, as it is not, it would have no application here for the reason that the Act of 1889 does not come into operation unless the existence of the contracts of 1872 and 1875 is presupposed. This is a question of fact. The mortgage was executed in 1911 before the suit relied upon by defendants was filed, and it is too elementary to require citation of authority that a mortgagee who was not a party to the suit is in nowise affected or bound thereby. The principle asserted, however, is unsound as shown by a long line of cases involving public and private right, and holding that the establishment of a fact or facts necessary to give incidence to a statute is not binding on such mortgagee or a purchaser under the mortgage.

Keokuk R. R. Co. v. Scotland County, 152 U. S. 318.

Secor v. Singleton, 41 Fed. 725.

Wycomo County v. Bancroft, 135 Fed. 977.

Trust Co. v. Des Moines, 224 Fed. 620.

Farmers' Loan & Trust Co. v. Meridian Water Works, 139 Fed. 661.

Columbia Ave. Savings Fund v. City of Watson, 130 Fed. 152.

Keokuk & W. R. R. Co. v. Mo., 152 U. S. 301.

Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296.

Old Colony Trust Co. v. City of Omaha, 230 U. S. 100.

It has been uniformly held that, although State, city or citizens had made claims affirmed by the highest court, declaring public duties, or burdening franchises, or physical properties under the statute, or ascertaining and adjudging facts on which the statutes would have incidence, yet nothing so decreed was *res adjudicata* against an admitted mortgagee, or purchaser under him.

It is believed that the two propositions submitted present substantially the errors complained of in the several assignments made.

It is submitted, therefore, that the decree of the court below dismissing this cause for lack of jurisdiction is erroneous and should be reversed; first, because that court in Cause No. 49 in Equity, Central Trust Company of New York v. International & Great Northern Railway Company, was foreclosing under receivership proceedings complainant's mortgage upon said properties and had actual possession at the time this suit was filed of the *res*; second, because that court had accurately and specifically reserved jurisdiction to determine all adverse claims to and upon the property affecting its ownership, operation, control and value, and had specifically reserved jurisdiction of this suit which was pending at the time the order was made; third, the bill dismissed is purely an ancillary or dependent bill and jurisdiction is not dependent upon citizenship, amount, residence or subject-matter, except that the

complaint must be germane to the purposes and objects of the original foreclosure suit.

It is, therefore, prayed that the decree appealed from be reversed.

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EXHIBIT A.

Act of the Legislature of the State of Texas of 1889, and amended by Act of 1899, being present Articles 6423, 6424, and 6425, Revised Statutes of Texas.

“Article 6423. Every railroad company chartered by this State, or owning or operating any line of railway within this State, shall keep and maintain permanently its general offices within the State of Texas at the place named in its charter for the locating of its general offices; and, if no certain place is named in its charter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this State where it shall have contracted or agreed, or shall hereafter contract or agree, to locate its general offices for a valuable consideration; and, if said railroad company has not contracted or agreed for a valuable consideration to maintain its general office at any certain place within this State, then such general offices shall be located and maintained at such place on its line in this State as said railroad companies may designate to be on its line of railway. And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and, if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.

“Article 6424. It shall be the duty of said railroad company to keep and maintain at the place

within this State where its said general offices are located the office of its president, or vice-president, also the office of its secretary, treasurer, local treasurer, auditor, general freight agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, fuel agent, general claim agent; and each and every one of its general offices shall be so kept and maintained, by whatsoever name it is known, and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where the said general offices of said railroad are required by law to be kept and maintained; and the persons holding said general offices of a railroad shall reside at the place and keep and maintain their offices of said railroad are required by law to be kept and maintained; and, if the duties of any of the above named officers are performed by any person, but his position is called by a different name, it is hereby made the duty of the said railroad company to have and maintain said offices at the place where its general Texas offices are kept and maintained, as required by this chapter; provided that if the judgment of the court shall be to forfeit the charter, then it shall allow the railroad company six months from the date of the judgment within which to comply with the requirements of this chapter, and if said railroad company shall comply with the said time no forfeiture shall occur; but if the railroad company shall not comply then the judgment shall be final; the object and meaning of this statute being to require every railroad company owning or operating a line of railway within this State to keep and maintain its general offices within this State at such place as required herein; and the name of the general offices shall not be understood to allow the railroad company to have any of the offices usually known as general offices at any other place than

the one it is required to keep its general offices at; and each and every railroad is hereby required to have and maintain its general offices at a place named herein; provided, further, that where the principal shops of any company are situated on its line in the State, at a place other than the place where its general offices are located, the superintendent of motive power and machinery, master mechanic, either or both, may have his office and residence at such place where such principal shops are located; and provided, further, that the railroad commission of Texas, where it is made to appear that any officer, other than the general officers of any company, can more conveniently perform his duties by residing at some place on the line in Texas other than the place where the general offices are situated, may, by an order entered on its record, authorize any such officer to so reside and keep his office at such place.

“Article 6425. Each and every railroad company chartered by this State, or owning, operating or controlling any line of railroad within this State, which shall violate any of the provisions of this chapter, shall forfeit the charter by which it operates its railroad in this State to the State of Texas; and it is hereby made the duty of the attorney general of this State, upon the application of any interested party, or on his own motion, to proceed at once against every railroad company owning, operating or controlling any line of railway within this State by quo warranto to forfeit the charter of the railroad company so offending, or violating any of the provisions of this law (and every such railroad company) shall in addition to forfeiting the charter to that part of the railroad situated within this State be subject to a penalty of five thousand dollars for each and every day it violates any of the provisions of this chapter; said penalty to be recovered in the name of the State of Texas by a suit which shall be filed by the attor-

ney general in any court in this State having jurisdiction; and on the trial the court shall, if it finds that the railroad company has violated any of the provisions of this chapter, render judgment in the name of the State of Texas at the rate of the sum of five thousand dollars for each and every day said court shall find that said railroad company violated any of the provisions of this chapter. And any money recovered from any railroad company under the provisions of this law shall be paid over into the State treasury and become a part of the available public free school fund."